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No. 481

Office Supreme Court, U.S.
FILED
OCT 30 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

MARIE TORRE,

Petitioner,

v.

JUDY GARLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

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October 30, 1958.

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PETITION FOR A WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

The judgment below relates to the conviction and commitment of a newspaper reporter for criminal contempt of court. The reporter was convicted for declining, in an action between private third parties, to disclose the confidential source of information published by the reporter in The New York Herald Tribune. The order of the District Court was affirmed by the Court of Appeals for the Second Circuit.

This is the first case in which a federal appellate court has ever ordered the forced disclosure of confidential news

sources. It is, moreover, the first case ever holding that a litigant's interest in compelling testimony in discovery proceedings is "paramount" to freedom of the press and overrides rights protected by the First Amendment.

Opinions Below.

The District Court rendered no opinion with respect to its granting of respondent's motion to compel petitioner to disclose a news source or with respect to its holding of petitioner in criminal contempt.

There is set out at page 116 of the Joint Appendix the opinion of the District Court denying petitioner's motion, under Rule 30 of the Federal Rules of Civil Procedure, that she not be compelled to disclose the news source. The opinion of the Court of Appeals is printed as Appendix A hereto.

Jurisdiction.

The order of the Court of Appeals is dated and was entered on September 30, 1958 and is printed as Appendix B hereto. Petitioner did not file a petition for rehearing.

Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented.

1. In furtherance of a private litigant's interest in compelling testimony, may a court constitutionally impose restraints upon the gathering of news?

2. Regardless of whether the First Amendment prohibits absolutely the forced disclosure of confidential news sources, does the public policy embodied in the Amendment

require safeguarding of such sources, at least in the absence of some even more compelling societal need?

3. May disclosure of news sources properly be compelled in discovery proceedings, absent any showing of real necessity or prejudice and where, in addition to the Constitutional and public policy objections,

—it is uncontradicted that such forced divulgence would inflict upon the reporter permanent and irreparable injury;

—such relief was requested prior to full use of procedures for securing such information from alternate sources;

—under the sworn admissions of the litigant, the litigant has no substantial likelihood of success on the claim in aid of which the information is demanded?

Constitutional Provision Involved.

The Constitutional provision pertinent to this petition is the First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statement.

On March 15, 1957, respondent Garland filed a complaint against Columbia Broadcasting System, Inc. ("CBS") in the District Court for the Southern District of New York (3-10).* The complaint purported to allege two claims. The first, not involved in the instant proceeding, alleged breach of contract.

The second claim, out of which this proceeding arose, sought judgment for $1,000,000, alleging that CBS "authorized, requested and induced the publication of false and defamatory matter in newspapers and other publications" concerning respondent (6). An alleged example, attached as Exhibit A to the complaint, was a story by petitioner which appeared in The New York Herald Tribune on January 10, 1957.

In its answer (11-13), CBS admitted the agreement and its termination and denied substantially all other allegations. The answer pleaded affirmative defenses and counterclaimed for $200,000. In respondent's reply to the counterclaim, respondent denied or denied knowledge of substantially all its allegations (14).

On September 30, 1957, respondent took petitioner's deposition (24-39). Petitioner testified fully except that she declined to identify the source of the statements reported in her story (32).

On October 21, 1957, respondent moved to compel petitioner's testimony and, in the event of petitioner's declining to testify, to punish her for criminal contempt (16-39). On November 1, petitioner cross-moved, under Rule 30 of the Federal Rules, that she not be compelled to testify on this matter and for other and further relief (42-92).

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* All references are to pages of the Joint Appendix.

On November 12, Judge Sylvester J. Ryan denied petitioner's motion, granted respondent's motion and, on petitioner's respectfully declining to answer, held petitioner in criminal contempt. Petitioner was sentenced to ten days' imprisonment and released on her own recognizance pending appeal. Notices of appeal were duly filed (123; 124-25).

On January 9, 1958, respondent permitted the period of limitations to expire within which respondent could have brought suit against petitioner and The New York Herald Tribune for the alleged defamatory matter appearing in petitioner's story.

On September 30, 1958, the Court of Appeals for the Second Circuit affirmed the decision of the District Court.

In the original action out of which this proceeding arose, the jurisdiction of the District Court was invoked under 28 U. S. C. §1332. Jurisdiction of the instant proceeding to punish petitioner for criminal contempt is grounded on 18 U. S. C. §401.

Reasons for Granting the Writ.

At stake here is the public's right to know the news—and the press' freedom to gather it.

This case presents a question of vital importance to every newspaper in the United States.

The court below has imposed a direct and substantial impediment on the gathering of news. It has done so in the first case ever decided on the federal appellate level on this issue.

This case is, moreover, the first case on this issue in any court which has weighed the demands of the First Amendment against a litigant's interest in compelling testimony in discovery proceedings. It resolves that conflict against the First Amendment.

The court below recognizes that the result it reaches "may entail an abridgement of press freedom by imposing some limitation upon the availability of news." Appendix A, p. 4a.

Nonetheless, it holds that a litigant's interest in compelling testimony in discovery proceedings is "paramount". *Id.*, p. 6a.

Unless reversed by this Court, the decision below will have an immediate effect on the willingness of news sources to transmit news in confidence to reporters and news media. It will lend aid to any forces seeking to choke off the flow of news to news media.

In permitting this needless restraint on the gathering of news, the decision below is contrary to the policies enunciated by this Court on the necessity of protecting the flow of news along its entire length—from news sources to the public. It is irreconcilable with the preferred place given by this Court to First Amendment rights.

Finally, the Court of Appeals imposed this restraint in a discovery proceeding, in the absence of any showing of real necessity or prejudice and with the recognition that the information sought might well be secured from other sources.

I.

Forced disclosure of confidential news sources is a real and dangerous restraint on news gathering.

The decision below has aroused undisguised concern among newspapers in all parts of this country.* It affects

* There is set out in Appendix C to this petition excerpts from some of the more than 70 editorials appearing in the press commenting on this proceeding, as well as a partial list of the newspapers which have expressed their concern with the decision below and their hope that this issue will now be resolved by this Court.

with equal impact the large metropolitan daily and the small country paper. Both know that the decision imposes a serious practical obstruction to their gathering of news and will reduce in significant measure the news available to them.

It is a commonplace that a great part of the news, including political, economic and scientific news, is, for perfectly proper reasons, communicated to reporters on condition that the source not be disclosed (44, 46). In such instances, refusal of the condition means refusal of the communication.

To the extent that any rule of law renders such assurance unavailable or precarious, to that extent the flow of news to the public is pinched off at its source and, *pro tanto*, the public's right to know is diminished.

This fact has been repeatedly recognized;* so far as known, it has never been questioned.

An authoritative study has declared:

> "News channels which prove valuable in unearthing such examples of public scandals remain so only as long as the source remains secret. Honest officials, and occasionally dishonest persons, who can furnish necessary information, cannot afford to jeopardize their freedom or their jobs by permitting their names to be used.
>
> "No community can afford to shut off these channels of information, and no honest newspaper can afford to keep its reporters in hourly fear of contempt charges. • • •
>
> *"No information would be given if the informant did not have faith in the integrity of the reporter in the matter of withholding his name. The newspaper man would find his channels of news closed."* Siebert

* See, *e.g.*, affidavit of Ogden R. Reid, President of New York Herald Tribune Inc., submitted to the District Court in support of petitioner's position (43-45).

and Ryniker, Editor and Publisher, September 1, 1934, pp. 36-37. (Emphasis supplied.)

In twelve states—Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Michigan, Montana, New Jersey, Ohio, and Pennsylvania—the public interest in protecting news sources has been accorded express statutory recognition.

That forced disclosure of news sources seriously impairs the vitality of news gathering has, moreover, been repeatedly recognized in all free nations.

In summarizing the arguments made on behalf of protection of sources of information of news personnel, the Secretary General of the United Nations has written:

> "*Often scandal, corruption and malfeasance can be exposed publicly only if an informant is confident that his identity will not be disclosed.* Such anonymity may well be a part of an informant's bargain with a newspaper reporter * * *." United Nations Economic and Social Council, Document E/2693, p. 25 (1955) (Emphasis supplied.)

A noted Swiss authority has written

> "*The most important materials would be lost to the press if the courts were permitted to search out the original author or sender or confidential source.*"*

The same thought was recently expressed by the Director of the French Press Institute, who wrote

> "Is not the right to secrecy concerning an informant a necessary condition for freedom of information? In fact, is there not the risk of drying up essential

* Gubler-Corti, *Zum Problem des Zeugnisverweigerungsrechtes der Journalisten* 203 (Switzerland 1957), quoting with approval from Keller, *Liability for Press Offenses.* (Translation supplied).

> sources of information * * * if one cannot guarantee, at his request, the anonymity of an informant? And isn't it a normal and necessary part of a journalist's work to seek information from the most qualified sources even if those sources prefer to remain anonymous?" Terrou, *The Protection of Sources of Information for Journalists*, IPI Report, Bulletin of the International Press Institute 2 (Zurich, Feb. 1958)

Protection of news sources has been accorded recognition in such diverse foreign jurisdictions as Pakistan, Sweden and the Philippines. See United Nations Economic and Social Council, Document No. E/2693, pp. 27-28 (1955).

Even those authorities not endorsing unqualified protection of news sources have fully recognized that such protection is an important constituent element of freedom of the press. Thus the late Zechariah Chafee stated:

> "* * * this power to make reporters disclose their confidential sources of information should be exercised with great caution. The power also applies to priests, as just stated, but few lawyers or judges would press a question to a priest after he had invoked his professional duty of silence. *It is similarly desirable to respect the reporter's claim of confidence except in cases of great necessity where he clearly possesses knowledge which is otherwise unobtainable.* Chafee, *Government and Mass Communications* 497 (1947)." (Emphasis supplied.)

And the New York Law Revision Commission, after completing an exhaustive study of the problems of protecting newsmen against disclosure of news sources, concluded:

> "The newsman's case differs from other cases where no privilege exists as to information obtained in confidence, in that *the newsman is performing the important function of keeping the public informed.*

> *A privilege to newsmen may therefore be justified when a privilege to others receiving information in confidence would not.*" 1949 Report of the Law Revision Commission 26. (Emphasis supplied.)

These authoritative voices, drawn from every corner of the globe where an unfettered press is recognized as a bulwark of the open society, make clear that the decision below will substantially impair the capacity of this country's press to gather the news.

II.

The First Amendment mandates against restraints at any stage of the flow of news to the public.

The restraint authorized below strips from news gathering the essential protection of the Amendment.

In the past, press restraints have most frequently been sought to be applied at the stage of news dissemination. This Court has rigorously struck down each such attempted restraint. See, *e.g.*, *Near* v. *Minnesota*, 283 U. S. 697 (1931).

Judicial protection of the press has not been limited, however, to direct restraints on publication of the type illustrated by *Near*.

Freedom from forced disclosure of identity has already been accorded by the courts to the last step in the news-dissemination process—the communication from the publisher to the reader. In striking down an attempt to inquire into the identity of purchasers of certain books and pamphlets, the Court of Appeals for the District of Columbia stated:

> "To publicize or to report to the Congress the names and addresses of purchasers of books, pam-

> phlets and periodicals is a realistic interference with the publication and sale of those writings. * * * There can be no doubt, in that case or in this one, that the realistic effect of public embarrassment is a powerful interference with the free expression of views. * * *" *Rumely* v. *United States,* 197 F. 2d 166, 174 (D. C. Cir. 1952), *aff'd on other grounds,* 345 U. S. 41 (1953).

In the concurring opinion in this Court in the same case, it was forcefully said:

> "If the present inquiry were sanctioned, the press would be subjected to harassment that in practical effect might be as serious as censorship. * * * A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. * * * Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. * * *" 345 U. S. at 57.

With increasing frequency in recent years, attempted restraints on the press have been applied, not at the stage of the now clearly immune news-disseminating function, but instead at the very start of the news flow: the flow from the source to the press.*

This Court has already given substantial recognition to the principle that the First Amendment includes in its sweep the gathering of news. Thus, in *Associated Press* v. *United States,* 326 U. S. 1 (1945), this Court stated:

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* See affidavit of Ogden R. Reid (43-45); Wiggins, *Freedom or Secrecy* (1956), *passim;* see, generally, Report of the Advancement of Freedom of Information Committee of Sigma Delta Chi [the professional journalistic society], pp. 12-17 (listing 63 instances of suppression of news at the source).

> "That Amendment [the First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." 326 U. S. at 20.

Not only does the Amendment constitute a "command that the government itself shall not impede the free flow of ideas" (*ibid.*) but, this Court made clear, a restraint upon free access to the sources of news (although in that case by a non-governmental combination) was a restraint upon a "constitutionally guaranteed freedom." *Ibid.*

In equally compelling language, Mr. Justice Murphy in his dissent in that case stated:

> "Nor can we escape the fact that *governmental action directly aimed at the methods or conditions of such collection or distribution is an interference with the press,* however differing in degree it may be from governmental restraints on written or spoken utterances themselves." *Id.* p. 51. (Emphasis supplied.)

See also *Associated Press* v. *KVOS,* 80 F. 2d 575 (9th Cir. 1935), *rev'd on jurisdictional grounds,* 299 U. S. 269 (1936).

News gathering and news dissemination are, in practice, inseparable aspects of a single publishing process. They should not be separable in law.

As a noted American reporter has stated:

> "The suggestion that freedom of reporting can exclude access to facts is extremely dangerous doctrine. The gleaning of facts is essential to knowledge, without which the right to publish is empty—and its exercise irresponsible."*

* Dorothy Thompson, quoted in Douglas, *The Right of the People* 81 (1958). The author describes Miss Thompson's statement (of which the above is a part) as "stating in the finest American tradition the function of the reporter."

III.

The lower court's holding cannot be reconciled with an unbroken line of decisions of this Court establishing the primacy of First Amendment rights.

This Court stated in *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936),

> "The predominant purpose of the grant of immunity [of the First Amendment] here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. • • • *A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.*" 297 U. S. at 250. (Emphasis supplied.)

When this Court has been called upon in the past, as it now is, to weigh First Amendment rights in the scales against other compelling rights, it has been fully cognizant of the unique nature of speech and press freedom. This Court has noted ". . . the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). And it has stated:

> ". . . the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press,

> as to the other liberties, the broadest scope that could be countenanced in an orderly society." *Bridges* v. *California*, 314 U. S. 252, 265 (1941).

It has cautioned that in balancing conflicting rights and interests,

> "... we remain mindful of the fact that the latter [freedom of press and religion] occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and ... appraise the ... reasons ... in support of the regulations ... of the rights.'" *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946).

In these decisions, this Court was not conferring special favors on a privileged industry. Instead, it was giving life and flesh to the basic assumption of a free society that an informed people can govern itself wisely. And it was confirming that, to assure that a people is adequately informed, the flow of news from the news source to the news-reading public must be left free of every dispensable restraint and obstruction.

The decision of the court below cannot be squared with this Court's doctrine of the preeminence of First Amendment rights. Nor can it be squared with the caution which this Court has consistently urged be exercised before any impairment of such rights be permitted.

IV.

The decision below is virtually the first ruling in this country compelling disclosure of news sources in private litigation.

The English courts have laid down a well-established rule according protection to news sources under similar circumstances.

With a single exception*, no court of this country has ever before ordered forced disclosure of news sources in private litigation. The decision below thus drastically alters the conditions under which American reporters will work in the future in securing information from confidential news sources.

The English Cases Protecting News Sources in Private Litigation.

In England, where the question has been much litigated, the law has long been to the effect that, in a private libel action against a newspaper, newsmen will not be compelled to divulge their sources. The law has been so established even where fair comment has been pleaded (thus making the identity of the source clearly relevant) and despite the fact that such disclosure of source is required from a defendant other than a newspaper.

In *Lyle-Samuel* v. *Odhams, Ltd.*, [1920] 1 K. B. 135, 140, the Court stated:

> "It is well established that in an action of libel against an individual—apart from any question of a newspaper—who pleads fair comment, it is permissible to interrogate him on both those matters for

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* *Brewster* v. *Boston Herald-Traveler Corp.*, 20 F. R. D. 416 (D. Mass. 1957).

the purpose of ascertaining whether or not his comment was justifiable or whether he may not have been actuated by malice. That is the general rule. *But it is also well-established, at any rate so far as this Court is concerned, that there is an exception to that rule in the case of newspapers.* This exception is clearly stated in *Plymouth Mutual Co-operative and Industrial Society* v. *Traders' Publishing Association*, when this Court treated the exception as long established and as binding on the Court of Appeal. In that case Stirling L.J. said: 'With regard to the seventh interrogatory, which asks from whom the defendants obtained the information on which they relied in publishing the alleged libel, I agree with my lord in thinking that the cases of *Hennessy* v. *Wright* and *Hope* v. *Brash* have laid down a rule from which we are not at liberty to depart, namely, that *the Court ought not in such a case as this to compel discovery of the names of the persons from whom the information on which the defendants acted in publishing the alleged libel was derived, in the absence of special circumstances.*' " (Emphasis supplied.)

In discussing the rationale behind the rule, Bankes, L.J., stated:

> " 'The second answer was that a newspaper stood in such a position that it was not desirable on grounds of public interest that the name of a newspaper's informant should be disclosed.' It may be that in that passage the Lord Justice was alluding to what is compendiously spoken of as the freedom of the press; that *it is in the public interest to maintain the freedom of the press; and that it would be difficult to maintain that freedom if the editor of a newspaper felt that he might be compelled to disclose the name of the person upon whose information he was acting in making the comment or inserting the statement.*" *Id.* at 141. (Emphasis supplied.)

This long established rule is followed and approved in England today. See *Lawsen & Harrison* v. *Odhams Press, Ltd.*, [1949] 1 K.B. 129; *Georgius* v. *Vice Chancellor of Oxford*, [1949] 1 K.B. 729.

The cleavage between the English rule and the decision below presents a disturbing anomaly. As this Court has stated:

> "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. . . ." *Bridges* v. *California*, 314 U. S. 252, 265 (1941).

Yet in this instance, the English courts have shown themselves clearly more sensitive to the necessities of a free press than have our own.

The Paucity of American Authority

The assumption is frequently made that there exists somewhere an overwhelming body of authority which requires disclosure of news sources by newsmen. Actual examination of the reported decisions reveals that the authority is surprisingly meager. In only three States, Florida, Georgia, and New York*, are there reported deci-

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* Florida: *Clein* v. *State*, 52 So. 2d 117 (Fla. 1951).

Georgia: *Plunkett* v. *Hamilton*, 136 Ga. 72, 70 S. E. 781 (1911); *cf. Pledger* v. *State*, 77 Ga. 242, 3 S. E. 320 (1887).

New York: *People ex rel. Mooney* v. *Sheriff of New York County*, 269 N. Y. 291, 199 N. E. 415 (1936). As the District Court correctly ruled (103-04), this Court is not bound by state precedents on this issue. *Erie* is clearly inapplicable since an independent federal question is here involved, *i.e.*, the applicability and weighing of the First Amendment, and, moreover, jurisdiction is here grounded on a criminal contempt of a federal judicial order. Even in a diversity action, state law would not control the exercise of a federal court's discretion in determining whether or not to compel testimony on a deposition. See *Hickman* v. *Taylor*, 329 U. S. 495 (1947); Rule 30(b), Federal Rules of Civil Procedure; see also 4 Moore, *Federal Practice* §26.23[9], pp. 1150-52.

sions of the State courts which, under any circumstances, compelled newsmen to divulge their sources, and which remain good law in those states today*.

In *all* the above cases, counterbalancing this public interest in protecting news sources was a strong public interest in the specific subject matter of the litigation there involved, *e. g.*, a grand jury investigation of corruption of public officials (*People ex rel. Mooney* v. *Sheriff of New York County*, 269 N. Y. 291, 199 N. E. 415 (1936); *Clein* v. *State*, 52 So. 2d 417 (Fla. 1951)), or a prosecution for criminal libel (*Plunkett* v. *Hamilton*, 136 Ga. 72, 70 S. E. 781 (1911)).

Yet with virtually a clean slate to write upon, the court below elected to turn its back on the apposite English authorities and to reach a result that, concededly, worked to impair the freedom of the press.

V.

The lower courts ordered disclosure of news sources in a discovery proceeding in the absence of—and without even requiring—a showing of good cause therefor.

Petitioner's testimony was ordered by the lower courts under the Federal Rules of Civil Procedure.

While urging upon the courts below that the First Amendment prohibited absolutely forced disclosure of confidential news sources, petitioner also urged that, at the very least, disclosure of news sources should not be com-

* See also *Matter of Wayne*, 4 U. S. D. C., Hawaii 475 (D. Hawaii 1914). Two other federal cases have been reported which involved the issue. Both refused to compel the newsmen's testimony, but for reasons not here germane. See *Rosenberg* v. *Carroll*, 99 F. Supp. 629 (S. D. N. Y. 1951) (dictum adverse to protection of news sources); *Ex parte Sparrow*, 14 F. R. D. 351 (N. D. Ala. 1953).

pelled in a discovery proceeding between private parties, absent the strongest possible showing of good cause.

That contention the lower courts rejected.

The sole tests applied by the District Court were whether the deposition was taken in good faith, was not oppressive of the witness, and related to a relevant issue. (116).

Similarly, the Court of Appeals treated materiality and relevance as the only touchstones, so long as respondent's claim against CBS was not "patently frivolous". Appendix A, pp. 8a-9a. Indeed, the Court of Appeals expressly noted that "it is possible that the plaintiff could have learned the identity of the informant by further discovery proceedings directed to CBS • • •." *Id.*, p. 8a.

In the past where the liberal discovery policies of the Federal Rules have clashed with a countervailing public policy, this Court has not hesitated to recognize the overriding public interest by appropriate qualification of the discovery rules. See *Hickman* v. *Taylor*, 329 U. S. 495 (1947).

The lower courts themselves have repeatedly—and properly—availed themselves of their power to limit the scope of discovery proceedings in appropriate cases.

See, e.g.,

Delong Corporation v. *Lucas*, 138 F. Supp. 805 (S. D. N. Y. 1956);

International Nickel Co. v. *Ford Motor Co.*, 15 F. R. D. 357 (S. D. N. Y. 1954);

Ross v. *Fire & Casualty Ins. Co. of Connecticut*, 17 Fed. Rules Serv. 30b. 35, Case 1 (E. D. Pa. 1952);

Shawmut, Inc. v. *American Viscose Corp.*, 11 F. R. D. 562 (S. D. N. Y. 1951);

Wagner Manufacturing Co. v. *Cutler-Hammer, Inc.*, 10 F. R. D. 480 (S. D. Ohio 1950);

Lever Bros. Co. v. *Procter & Gamble Mfg. Co.*, 38 F. Supp. 680 (D. Md. 1941), *rev'd on other grounds*, 139 F. 2d 633 (4th Cir. 1943).

Indeed, the Federal Rules themselves explicitly contemplate limitation of the scope of examination, for example by providing procedures under which "secret processes, developments, or research need not be disclosed." Federal Rules of Civil Procedure, Rule 30(b).

Certainly, in none of these instances could it be contended that there has been any encroachment upon the judicial power to compel testimony at a litigant's behest. Rather these instances evidence a judicial recognition that, in view of the countervailing policies there involved, some adaptation of the discovery procedure was called for.

It is submitted that the policy favoring the freedom of the press from restraints on news gathering is at least as strong as—if indeed not far stronger than—the policy favoring preservation of trade secrets or the inviolability of a lawyer's files.

In *Hickman* v. *Taylor, supra,* this Court was confronted with much the same task it now faces. There too a demand was made for discovery "without any showing • • • of the necessity for the production • • • or any indication that denial of production would cause hardship or injustice". 329 U. S. at 509. In refusing to order discovery, this Court ruled that the policy militating against discovery was there sufficiently strong that "a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." *Id.* at 512.

In the instant proceeding, far from respondent's sustaining any burden adequate to override the First Amendment considerations here present, the facts affirmatively

show that respondent's claim for compelling petitioner's testimony is particularly weak.

Alternate methods of securing the desired information are readily available to respondent.

Respondent sought to compel petitioner's testimony prior to completing the taking of CBS' depositions, prior to serving any interrogatories, and prior to serving a notice to admit.

In a belated attempt to meet this deficiency, respondent thereafter served interrogatories upon CBS. CBS then disclosed that, while all but two CBS employees denied having made statements to petitioner, two named employees had conceded that they might have made such statements.

At this late date, respondent has still not sought to take the deposition of one of the two CBS employees specifically identified by name by CBS.

At this moment, three specific procedures remain available to respondent to procure the information she desires: completion of the depositions of CBS, receipt of further answers to respondent's interrogatories (ordered almost a year ago by a motion judge) and demand upon CBS for admissions under Rule 36. Any or all of these may produce the very information respondent seeks and render this entire proceeding academic.

Respondent has failed to show any substantial likelihood of success on the merits.

Good cause for discovery would seem minimally to include some showing that there was at least prima facie merit to the claim in aid of which discovery is sought.

Whether or not respondent's claim may properly be deemed "patently frivolous", it seems clear that respondent has not made and could not make any showing of a sub-

stantial likelihood of success on the merits. However objectionable the remarks upon which respondent's claim rests may be to respondent, they would not appear to rise to a level at which a court will take cognizance by entertaining an action for libel.

See,

Kimmerle v. *New York Evening Journal*, 262 N. Y. 99, 186 N. E. 217 (1933);

Landau v. *Columbia Broadcasting System*, 205 Misc. 357, 128 N. Y. S. 2d 254 (Sup. Ct. N. Y. Co. 1954), *aff'd* 1 App. Div. 2d 660, 147 N. Y. S. 2d 687 (1st Dep't 1955);

Lamberti v. *Sun Printing & Publishing Co.*, 111 App. Div. 437, 97 N. Y. Supp. 694 (2d Dep't 1906).

Even more important, respondent on her deposition frankly conceded, point for point, that she has—and long has had—a reputation to precisely the effect of the statements on which the alleged action for defamation is based (70, 71, 80, 81, 86-87). Whether or not that reputation was justified, its conceded existence alone would seem to destroy the basis of any claim that respondent might have.

It is submitted that, before permitting discovery proceedings to inhibit the gathering of news, the federal courts should require, at the very least, the same substantial showing now required to justify discovery under the rule of *Hickman* v. *Taylor*—a standard which the respondent in the instant proceeding was not asked to and cannot meet.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MATHIAS F. CORREA.
63 Wall Street,
New York 5, New York,
Attorney for Petitioner.

Of Counsel:

SHELDON OLIENSIS.

October 30, 1958

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 325—October Term, 1957.

(Argued May 2, 1958 Decided September 30, 1958.)

Docket No. 24951

JUDY GARLAND,

Petitioner-Appellee,

v.

MARIE TORRE,

Respondent-Appellant.

Before: CLARK, Chief Judge, HINCKS and STEWART, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, Judge.

Marie Torre appeals from an order holding her in criminal contempt for refusing to answer a question originally asked in the course of a deposition. Affirmed.

LIONEL S. POPKIN, of Hess, Mela, Segall, Popkin & Guterman, New York City (LEE N. STEINER, New York City, of counsel), for Petitioner-Appellee.

MATHIAS F. CORREA, of Cahill, Gordon, Reindel & Ohl, New York City (SHELDON OLIENSIS, New York City, of counsel), for Respondent-Appellant.

STEWART, Circuit Judge:

Judy Garland brought an action against Columbia Broadcasting System, Inc. (CBS), in the district court. Her complaint set out two claims, one for breach of contract, the other alleging that the defendant had made false and defamatory statements about her and had "authorized, requested and induced" their publication in newspapers and elsewhere. An alleged example of such a publication, annexed as an exhibit to the complaint, consisted of a few paragraphs in a column entitled "TV-Radio Today," written by Marie Torre, and published in the *New York Herald-Tribune* on January 10, 1957. In this column Miss Torre attributed to a CBS "network executive" several statements about the plaintiff which, the complaint alleged, were false, defamatory, and highly damaging to the plaintiff's professional reputation. CBS filed an answer and counterclaim, denying among other things that it had made the alleged false and defamatory statements or caused them to be published.

With the issue thus joined, counsel for both parties embarked upon pre-trial discovery proceedings. In a deposition taken by the defendant's counsel, the plaintiff testified that she did not know who at CBS had made the statements appearing in the Torre column, but that she had "been told it was either Lester Gottlieb or Hubbell Robinson." Gottlieb and Robinson were both executives of CBS. In their depositions, taken by the plaintiff's counsel, each denied making the statements in question. Each also denied knowing the identity of the "network executive" referred to in the column.[1]

The plaintiff's counsel then took Marie Torre's deposition. She testified that the statements appearing in the column were in "exact words" statements which had been made to her over the telephone by a CBS informant. She refused, under repeated questioning, to give the name of

[1] A third CBS executive, whose deposition was taken later, testified similarly.

this "network executive," asserting that to do so would violate a confidence. Proceedings were then initiated in the district court to compel her to disclose the name. Her counsel countered by filing a motion for an order directing that the identity of the CBS informant "not be inquired into" upon the ground that examination upon this subject would "unreasonably annoy, embarrass and oppress" the deponent. F. R. Civ. P., Rule 30. After a hearing the district court denied the latter motion and ordered the witness to state the name of her informant. Upon her refusal in the presence of the court to do so, she was held in criminal contempt, and this appeal followed.[2]

Three alternative arguments are advanced in support of the appellant's position that it was error to require her to disclose in these pre-trial proceedings the identity of a confidential news source.[3] The first contention is a Constitutional one—to compel newspaper reporters to disclose confidential sources of news would, it is asserted, encroach upon the freedom of the press guaranteed by the First Amendment, because "it would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish *pro tanto* the flow of news to the public." Secondly, it is urged that quite apart from any Constitutional question, the societal interest in assuring a free and unrestricted flow of news to the public should impel this court to hold that the identity of a confidential news source is protected by at least a qualified privilege. Finally, the appellant contends that in the particular circumstances of this case the district court in any event should have ordered, under F. R. Civ. P., Rule 30,

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[2] Sentenced to ten days imprisonment, the appellant was promptly released upon her own recognizance pending determination of the appeal. The district judge expressly noted on the record that the appellant was entirely respectful to the court and intended no personal affront to its dignity.

[3] This confidentiality was apparently not explicit: "Q. Did this network executive ask you to withhold giving his name? A. No, he did not. It is just that having worked in the business so long, in cases like this you don't mention the man's name."

that no inquiry be made as to the identity of the CBS spokesman.

As to the Constitutional issue, we accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news.[4] Freedom of the press within the historic meaning of the First Amendment meant primarily freedom from previous restraints upon publication and freedom from censorship. *Near* v. *Minnesota*, 283 U. S. 697, 716 (1931). Yet in the domain of indispensable First Amendment liberties, it is essential "not to limit the protection of the right to any particular way of abridging it." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 249 (1936). The fact that no direct restraint is imposed does not determine the question. *Communications Assn.* v. *Douds*, 339 U. S. 382, 402 (1950). "[A]bridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 461 (1958).

But freedom of the press, precious and vital though it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom. That kind of determination often presents a "delicate and difficult" task. *Schneider* v. *State*, 308 U. S. 147, 161 (1939); *Communications Assn.* v. *Douds*, *supra*, at 400 (and see cases cited in that opinion at pages 398 and 399). The task in the present case, though perhaps delicate, does not seem difficult.

"Liberty, in each of its phases, has its history and connotation." *Near* v. *Minnesota*, *supra*, at 708. Freedom of the

[4] Insofar as this proposition is factually supported in the record by the affidavits of Ogden R. Reid and Marie Torre, it is of course more than just a hypothesis. To be noted, however, are decisions to the effect that a journalist's professional status does not entitle him to sources of news inaccessible to others. *United Press Associations* v. *Valente*, 308 N. Y. 71, 123 N. E. 2d 777 (1954); *The Tribune Review Pub. Co.* v. *Thomas*, 254 F. 2d 883 (3 Cir., 1958).

press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.

It would be a needless exercise in pedantry to review here the historic development of that duty.[5] Suffice it to state that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of the judicial power of the United States. *Blair* v. *United States*, 250 U. S. 273, 279-281 (1919); *Wilson* v. *United States*, 221 U. S. 361, 372-373 (1911); *Blackmer* v. *United States*, 284 U. S. 421, 438 (1932); *United States* v. *Bryan*, 339 U. S. 323, 331 (1950). Whether or not the freedom to invoke this judicial power be considered an element of Fifth Amendment due process, its essentiality to the fabric of our society is beyond controversy.[6] As Chief Justice Hughes put it: "[O]ne of the duties which the citizen owes to his government is to support the administration of justice by attending its courts

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[5] The history of the development of testimonial compulsion in English law is summarized in 8 Wigmore, *Evidence*, §§2190-2191 (3d ed. 1940). It was only after years of creative evolution that Sir Francis Bacon was able in 1612 to say in the *Countess of Shrewsbury's Trial*, 2 Howell's State Trials 769, 778: "* * * you must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be anything that imports the king's service, they ought themselves undemanded to impart it, much more if they be called and examined, whether it be of their own fact or of another's they ought to make direct answer." 8 Wigmore, *Evidence*, §2190. By the early Eighteenth Century it had become a "maxim" that "the public has a right to every man's evidence." 8 *id.* §2192.

[6] It has been pointed out that the Sixth Amendment, expressly securing to criminal defendants the right to compulsory process for their witnesses, "provided nothing new or exceptional; but gave solid sanction, in the special case of accused persons, to the procedure ordinarily practised and recognized for witnesses in general." 8 *id.*, §2191.

and giving his testimony whenever he is properly summoned." *Blackmer* v. *United States, supra,* at 438.

Without question, the exaction of this duty impinges sometimes, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears. But "[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair* v. *United States, supra,* at 281.

If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 148 (1907). This, as Mr. Justice Frankfurter has pointed out in a somewhat different context, "has nothing to do with curtailing expression of opinion, be it political, economic, or religious, that may be offensive to orthodox views. It has to do with the power of the state to discharge an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures." *Bridges* v. *California*, 314 U. S. 252, 291 (1941) (dissenting opinion). See *Patterson* v. *Colorado*, 205 U. S. 454, 462-463 (1907).[7]

It is to be noted that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful

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[7] Compare *Bridges* v. *California*, 314 U. S. 252 (1941); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Craig* v. *Harvey*, 331 U. S. 367 (1947). These decisions all recognized that when the exercise of freedom of the press directly impedes the proper functioning of the judicial process, it must yield.

relevance or materiality. Cf. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 464-465 (1958). The question asked of the appellant went to the heart of the plaintiff's claim. We hold that the Constitution conferred no right to refuse an answer.

But even though lacking Constitutional sanction, the appellant's refusal to disclose the name of her informant should, it is asserted, be protected by an evidentiary privilege. A threshold question—whether the existence of such a privilege is to be determined in this diversity case solely by New York law—is one unnecessary to decide.[8] If New York law controls, there is no privilege. *People* v. *Sheriff of New York County*, 269 N. Y. 291, 199 N. E. 415 (1936). If we are free to look beyond the law of New York, we find no reason to depart from the precedents, federal and state, refusing to recognize such a privilege in the absence of a statute creating one. *Brewster* v. *Boston-Herald-Traveler Corp.*, 20 F. R. D. 416 (D. Mass., 1957); *Rosenberg* v. *Carroll*, 99 F. Supp. 629 (S. D. N. Y., 1951); *Clein* v. *State*, 52 So. 2d 117 (Fla., 1950); *Plunkett* v. *Hamilton*, 136 Ga. 72, 70 S. E. 781 (1911).

The privilege not to disclose relevant evidence obviously constitutes an extraordinary exception to the general duty to testify. Even those few situations to which the law has long accorded this privilege have been seriously questioned.[9] It has been emphasized that the tendency should be "not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege." *People* v. *Sheriff of New York County*, *supra*, 269 N. Y., at 295, 199 N. E., at

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[8] Compare *Engl* v. *Aetna Life Ins. Co.*, 139 F. 2d 469, 470 (2 Cir., 1943); *Palmer* v. *Fisher*, 228 F. 2d 603, 607-8 (7 Cir., 1955); *Munzer* v. *Swedish American Line*, 35 F. Supp. 493, 496 (S. D. N. Y., 1940); *Reeves* v. *Pennsylvania R. Co.*, 8 F. R. D. 616 (D. Del., 1949) with *Scourtes* v. *Fred W. Albrecht Grocery Co.*, 15 F. R. D. 55, 57 (N. D. O., 1953); *Ex parte Sparrow*, 14 F. R. D. 351 (N. D. Ala., 1953). Cf. *Hickman* v. *Taylor*, 329 U. S. 495 (1957). See 4 Moore, *Federal Practice*, §26.23[9]; Greene, *The Admissibility of Evidence under the Federal Rules*, 55 Harv. L. R. 197 (1941).

[9] See, *e.g.*, Morgan, "Foreword," *Model Code of Evidence* (1942), pp. 22-30.

416.[10] To recognize the privilege asserted here, assuming our power to do so, would poorly serve the cause of justice.

There remains the appellant's argument that in the circumstances of this case the district judge should have ordered, under Rule 30, F. R. Civ. P., that no inquiry be made of her as to the identity of her CBS informant.[11] The appellant points to the injury to her position as a journalist that could result from her compulsion to testify and to the possibility that the plaintiff might be able to acquire the information somewhere else. She also argues that the plaintiff's claim for defamation is "of problematical merit, with grave doubt of ever being brought to trial," and that the information sought to be exacted will therefore probably prove of no actual use to the plaintiff.

The language of Rule 30 clearly places the making of protective orders within the discretion of the trial court. There was no abuse of that discretion in this case. In denying the motion, Judge Ryan found that the deposition was "being taken by plaintiff in good faith and not in such manner as to unreasonably annoy, embarrass or oppress the witness," and further that it was "a necessary step in the due and proper preparation for trial."

These findings were entirely justified. While it is possible that the plaintiff could have learned the identity of the informant by further discovery proceedings directed to CBS, her reasonable efforts in that direction had met with

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[10] See, *e.g.*, 8 Wigmore, *Evidence*, §§2192, 2286 (3d ed., 1942); Ladd, "A Modern Code of Evidence," *Model Code of Evidence* (1942), p. 346. An extension of the privilege of nondisclosure to newspapermen has been the subject of considerable specific study and criticism. See New York Law Revision Commission, *Report* (1949), pp. 23-168, for a comprehensive treatment of the subject in all its aspects; see excerpts from 1930 bulletins of the Committee on State Legislation, Assn. of the Bar of the City of N. Y., and from 1938 report of the A. B. A. Committee on the Improvement of the Law of Evidence quoted in 8 Wigmore, *Evidence*, §2286 (3d ed., 1942).

[11] The appeal from the contempt order opens the preliminary proceedings to review. *Hickman* v. *Taylor*, 153 F. 2d 212 (3 Cir., 1945), aff'd, 329 U. S. 495 (1947).

k of success. Without intimating the slightest
he merits of Judy Garland's claim against CBS
tion, we cannot say that the claim is patently
The information sought was of obvious materi-
elevance. That being so, the eventual outcome
ation is not for the appellant nor for this court
phesy. Cf. *Blair* v. *United States*, 250 U. S. 273

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APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of September one thousand nine hundred and fifty-eight.

Present:

Hon. CHARLES E. CLARK,
Chief Judge.
Hon. CARROLL C. HINCKS,
Hon. POTTER STEWART,
Circuit Judges.

JUDY GARLAND,
Plaintiff,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Defendant.

IN THE MATTER
of
The Application of JUDY GARLAND,
Petitioner-Appellee
for an order directing Marie Torre, to answer a certain question, etc.,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro,
Clerk.

APPENDIX C.

Excerpts from Representative Editorials Relating to Proceeding.

Ambridge (Pa.) Citizen, October 24, 1957

> "By all means the case should be taken to the highest court in the land. A decision would clear any misunderstanding in the future as to the rights of newspaper workers."

Baltimore (Md.) Sun, October 1, 1958

> "One of the two great principles at stake is obviously freedom of the press. If reporters had to divulge their sources of information on all ticklish stories, those sources would dry up. The press would be less free to inform the public. The public would be less well-informed. • • • The last word can come only from the United States Supreme Court and the case ought to be heard there."

Centralia (Wash.) Chronicle, October 21, 1957

> "It [protection against disclosure of news sources] is fundamental to obtaining news. The freedom of the press is here directly involved."

Chicago (Ill.) Daily Defender, October 6, 1958

> "We were much dismayed by the action of the Appeals Court. • • • We trust that the Supreme Court will vacate the Torre conviction. For, if newspapers are obliged by law to expose their source of information for any story that forms the basis of a litigation, their services to the public will be considerably hampered."

Chicago (Ill.) Sun-Times, October 19, 1957

"Freedom to *publish* obviously must include freedom to *gather* news. This freedom to gather has never been adequately spelled out in court decisions. . . .

"Men who have such information, *to which the public is entitled*, would be afraid to pass it along if they thought a reporter could be forced to expose them to retaliation. They would be intimidated in advance, and the public would suffer.

"When the courts, therefore, demand that a reporter name a confidential source, they invade the right to gather news *freely*."

Des Moines (Iowa) Tribune, October 6, 1958

"Newspapers readily concede also that other rights than the free press guarantee, such as the right to due process of law, must be protected.

"But a decision which might set a precedent for impairing the public's right to know is disturbing."

Editor & Publisher, October 4, 1958

"A newsman's privilege and duty to protect his confidential sources at any cost has received a damaging blow from the U. S. Circuit Court of Appeals in the Marie Torre contempt case. . . .

"The present case may seem unimportant enough to argue about to some people but as a matter of principle it is paramount. There will be other cases where the protection of a source may be vastly more important.

"We hope that Miss Torre and her employer will pursue this to the highest court."

Hartford (Conn.) Times, November 15, 1957

"If a reporter can be forced to reveal his sources, persons with valid information about corruption or injustice often will be afraid to go to the press with

what they know. We should have a Supreme Court ruling on this matter.

"Fundamentally, the issue is that freedom of the press implies freedom to gather news, which in turn implies a responsibility to protect news sources."

Jackson (Mich.) Citizen-Patriot, October 19, 1957

"If the newsman's source knows he is safe from retaliation from a crooked superior, the reporter can uncover scandals of vast importance. If the source does not have the assurance, the reporter is seriously handicapped.

"The basic issue goes far beyond her [petitioner's] case, and it should be explicitly defined."

Memphis (Tenn.) Commercial Appeal, October 12, 1958

"In the case of newspapers, protection of confidential news sources is essential to unhampered dissemination of news in a free society."

Minot (N. D.) News, October 9, 1958

"The Supreme Court has never decided whether privilege extends to newspaper men under the guarantees of the First Amendment. It is a question of vital importance to the freedom of the press."

Monroe (Mich.) News, October 8, 1958

"Among those basic freedoms of American democracy are those enumerated in the First Amendment of the Constitution, one of which is freedom of the press—and 'freedom of the press' has traditionally been understood to include protection of news sources."

Montgomery (Ala.) Alabama Journal, October 4, 1958

"A principle close to the heart of every newspaper man is here involved. Writers feel honor bound not to divulge their sources of information. It is one of the fundamentals of reporting."

Nashville (Tenn.) Banner, November 14, 1957

"* * * many people who have information on matters of public concern would never divulge it at all if they knew their identity would promptly be disclosed and they would be drawn into the affair."

New York (N. Y.) Daily News, October 2, 1958

"We hope the appeal [to the Supreme Court] will be taken without fail. . . . If newspapers become legally obligated to tell where they got their information for any news story that gets into court, their ability to serve the public will be badly undercut."

New York (N. Y.) Times, October 2, 1958

"The Court of Appeals itself accepted the argument that 'compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom,' a point that no one familiar with the profession could possibly dispute. . . ."

"The specific issue that arises in the Torre case has never been judicially settled, and so it will be of great help in clarifying this matter if The Herald Tribune carries it on appeal to the Supreme Court, as it has stated it intends to do."

New York (N. Y.) World-Telegram & Sun, October 2, 1958

"That [appeal] should serve a purpose beyond the particulars of this case. Policies, laws and rulings concerning a reporter's right (or lack of it) to protect sources of information with anonymity are a hodgepodge of contradiction and variance, depending on what court in what state one goes to. A ruling from the highest court could and should clarify this matter and its relationship to the constitutional guarantees of freedom of the press."

Oakland (Calif.) Tribune, October 3, 1958

"* * * it will be the first time in history the highest tribunal will have been called upon to interpret the First Amendment on the issue of protecting sources of information. It will be a historic chapter in the story of the American press."

Oswego (N. Y.) Palladium-Times, October 3, 1958

"No newspaperman who divulges his sources can expect to have sources very long. There are many persons who, through friendship, obligation, a sense of doing the right thing or just the satisfaction of knowing he is the source of a news article, will tip a newspaperman to story. * * * As a result, the public is better informed, and its information is more timely.

"If the Supreme Court establishes an obligation for a reporter to divulge his source, the public will ultimately suffer."

Pensacola (Fla.) News Journal, October 6, 1958

"* * * the Herald-Tribune plans to take the case up and if it should win, a new precedent will be set which will aid reporters considerably in writing news without bringing law suits and embarrassment or other recriminations against their tipsters."

Providence (R. I.) Bulletin, October 26, 1957

"The privileged communications status of a newspaperman is at present in the twilight zone, needing clarification and definition by law."

San Antonio (Tex.) News, October 31, 1957

"That question is as important to the general public as to the journalistic profession, because it involves freedom of information that invigorates and protects democratic society. If a newsman's confidences could be breached on slight pretexts, vital sources of informa-

tion—especially the tips and leads that trigger big public-interest stories—would dry up."

Springfield (Mass.) Union, October 18, 1957

"Protection for a news source, when protection is asked, is a prerequisite to obtaining and following up many important news stories which otherwise might not appear in print for the information of the public. To afford such protection should be the privilege of the newspaper, more particularly since a newspaper cannot avoid responsibility for what it prints and lays itself open to suit for libel in any news that it presents. • • • The newspaper should be privileged to keep its sources anonymous when it assumes the risk of being sued for any libel involved. Clarification on this point by a federal appellate court is long overdue."

Partial List of Newspapers Editorially Urging Review.

Allentown (Pa.) Call, October 4, 1958
Ambridge (Pa.) Citizen, October 24, 1957
Anderson (S. C.) Mail, October 23, 1957, October 7, 1958
Ashland (Ky.) Independent, October 23, 1957
Ashland (Ohio) Times Gazette, October 24, 1957, October 6, 1958
Auburn (N. Y.) Citizen-Advertiser, November 13, 1957, October 3, 1958
Augusta (Ga.) Herald, October 6, 1958

Baltimore (Md.) Sun, October 1, 1958
Bellevilie (Ill.) News Democrat, October 6, 1958
Bridgeport (Conn.) Telegram, October 6, 1958
Buffalo (N. Y.) Courier Express, October 21, 1957, November 13, 1957

Centralia (Wash.) Chronicle, October 21, 1957
Chicago (Ill.) Daily Defender, October 6, 1958
Chicago (Ill.) Sun-Times, October 19, 1957
Corvallis (Ore.) Gazette Times, October 9, 1958

Danville (Va.) Bee, October 4, 1958
Des Moines (Iowa) Tribune, October 6, 1958

Editor & Publisher, October 4, 1958
Elizabeth (N. J.) Journal, November 15, 1957
Elmira (N. Y.) Star-Gazette, November 18, 1957

Florence (S. C.) News, October 1, 1958

Gainesville (Fla.) Sun, October 23, 1957
Geneva (N. Y.) Times, November 14, 1957
Grafton (W. Va.) Sentinel, October 6, 1958

Hamilton (Ohio) News Journal, October 15, 1958
Hartford (Conn.) Times, November 15, 1957
Hickory (N. C.) Record, October 13, 1958
Hudson (N. Y.) Register-Star, October 21, 1957

Jackson (Mich.) Citizen-Patriot, October 18, 1957

Memphis (Tenn.) Commereial Appeal, October 13, 1958
Miami (Fla.) News, October 22, 1957
Minot (N. D.) News, October 9, 1958
Monroe (Mich.) News, October 8, 1958
Montgomery (Ala.) Alabama Journal, October 4, 1958

Nashville (Tenn.) Banner, November 16, 1957
New Brunswick (N. J.) Home News, November 21, 1957
New York (N. Y.) Daily News, October 18, 1957, November 13, 1957, October 2, 1958
New York (N. Y.) Times, October 2, 1958
New York (N. Y.) World Telegram and Sun, October 18, 1957, October 2, 1958

Oakland (Calif.) Tribune, October 18, 1957, November 13, 1957, October 3, 1958
Ogdensburg (N. Y.) Journal, November 21, 1957
Oneida (N. Y.) Dispatch, October 24, 1957, October 4, 1958
Oswego (N. Y.)Palladium-Times, October 3, 1958
Owensboro (Ky.) Messenger-Inquirer, October 23, 1957

Pensacola (Fla.) News-Journal, October 6, 1957
Providence (R. I.) Bulletin, October 26, 1957
Point Pleasant (W. Va.) Register, November 25, 1957

Roanoke (Va.) Times, October 9, 1958
Rochester (N. Y.) Democrat & Chronicle, October 30, 1957
Rochester (N. Y.) Times Union, November 14, 1957

San Antonio (Tex.) News, October 31, 1957
Schenectady (N. Y.) Gazette, October 3, 1958
Sherman (Tex.) Democrat, October 15, 1958
Springfield (Ohio) Sun, October 26, 1957
Springfield (Mass.) Union, October 18, 1957

Utica (N. Y.) Press, November 18, 1957

Valparaiso (Ind.) Vidette-Messenger, October 24, 1957

Watertown (N. Y.) Daily Times, October 18, 1957
Williamson (W. Va.) News, November 22, 1957

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IN THE

Supreme Court of the United States

October Term, 1958

No. 481

MARIE TORRE,

Petitioner,

against

JUDY GARLAND,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LIONEL S. POPKIN,
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Of Counsel:
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LEE N. STEINER,

November 17, 1958.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

We respectfully submit that the petition for a writ of certiorari should be denied.

Petitioner asserts that a constitutional question is involved. We submit that all that is involved is the effort of a newspaper reporter to claim a privilege against testifying when she has no such privilege.

We urge that the petition should be denied for the following reasons:

1. In the State of New York, where this case arose and where the libel occurred, a newspaper reporter is not privileged. See *People ex rel. Mooney* v. *Sheriff of New York County*, 269 N. Y. 291 (1936). The interest of newspapers in this case, to which petitioner has referred at length in her petition, arises from their natural desire to create a new privilege for their own benefit. They have

not concerned themselves with the greater interest of the courts and litigants in obtaining material facts through witnesses having knowledge thereof in lawsuits between private litigants. The alleged public interest, to which petitioner has referred is not real but was created by the newspapers in their own self-interest.

2. A witness might just as well assert that the constitutional right of freedom of speech relieves him of repeating on the witness stand what he stated outside of court.

3. Petitioner Torre is not a reporter. She is a writer of a "gossip" column and the press is in no danger because the writer of a "gossip" column is required to state the name of the person who made libelous statements to her, which she in turn repeated. As appears from one of her columns (9)* she repeated libelous statements concerning respondent which were made to her by a "CBS" (Columbia Broadcasting System) executive (9), quoting the very words which had been told to her. The nature of her column (9-10)—pure gossip—appears (a) from the remark that the popular notion that everybody loves Judy Garland "requires a bit of revision" (9), (b) "Anyway, Webb (a TV performer) makes it clear he's none too happy about 'folding my tent like an Arab' " (10) and (c) "Pinky Lee • • • is bubbling over with TV ideas" (10). It is at least doubtful that those who adopted the First Amendment had such comments in mind.

4. Since petitioner stated that the statements were made to her by a CBS executive, she had already disclosed the source of her information and all that she has been required to do by the order of the District Court, as af-

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* References, for example (3) are to pages of the Joint Appendix. References, for example (5a) are to Appendix A of the Petition and (6b) to Appendix B of the Petition.

firmed by the Court of Appeals, is to state the name of that executive who, concededly, did not make the statements to her in confidence (32).

5. Freedom of the press is not in any event involved. Respondent has never sought to interfere and the order compelling the petitioner to disclose the name of the CBS executive does not interfere with the gathering or publication of news. Torre was free and is still free to obtain statements, gossip or otherwise, from whomsoever she pleases and to repeat them in her column.

6. Freedom of the press, moreover, does not extend to everybody connected with a newspaper. For example, it does not, in our opinion, protect a linotypist or an engineer in the employ of a newspaper from testifying to a matter in litigation. A "gossip" columnist is similarly not protected.

The Opinion of the Court of Appeals

The opinion of Judge (now Mr. Justice Stewart) concurred in unanimously, appears as Appendix A to the petition.

In his opinion, Mr. Justice Stewart dealt as follows with the "Three alternative arguments * * * advanced in support of the appellant's (petitioner's) position" (3a):

> 1. He accepted without deciding, the hypothesis that applying the law of the land to journalists in like manner as to all other people, might make the gathering of news more difficult (4a) but stated that even assuming such hypothesis this present case "does not seem difficult" (4a).

Mr. Justice Stewart then stated (4a-5a) that:

> What must be determined is whether the interest to be served by compelling the testimony of the witness in the *present case* justifies some impairment

of this First Amendment freedom" (4a—italics ours).

And with respect thereto he stated that

"Freedom of the press * * * is not an absolute" (4a). "Freedom of the press * * * is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press" (4a-5a). Further, "that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of the judicial power of the United States." (5a) It is "'[O]ne of the duties which the citizen owes to his government * * * to support the administration of justice by * * * giving his testimony whenever he is properly summoned'", (5a-6a) citing *Blackmer* v. *United States*, 284 U. S. 421, 438.

Mr. Justice Stewart then pointed out (6a):

"Without question, the exaction of this duty impinges sometimes, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears. But '(t)he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.' *Blair* v. *United States* [250 U. S. 273 (1919)], *supra*, 281."

Thus, as Mr. Justice Stewart indicated, every time a person is called to the witness stand and required to testify to what he stated off the stand, it could be argued that his right of freedom of speech is impinged upon. He concluded that "*If* an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair

administration of justice." (6a—italics ours). Citing *Bridges* v. *California*, 314 U. S. 252 (1941); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Craig* v. *Harvey*, 331 U. S. 367 (1947), (footnote 6a), the Court stated: "These decisions all recognized that when the exercise of freedom of the press directly impedes the proper functioning of the judicial process, it must yield." In this case, said Mr. Justice Stewart, there was no effort to force a "wholesale disclosure of a newspaper's confidential sources of news" (6a). "*The question asked of the appellant went to the heart of the plaintiff's claim*" (7a—italics ours).

2. Petitioner is not protected by an evidentiary privilege. (7a). New York grants no privilege (7a). If that question is to be determined by law other than that of New York, Mr. Justice Stewart stated "we find no reason to depart from the precedents, federal and state, refusing to recognize such a privilege in the absence of a statute creating one" (7a) (citing cases). "[T]he tendency should be 'not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege'" (7a).

3. Mr. Justice Stewart held that there "was no abuse of * * * discretion in this case" in ordering petitioner to state the name of her CBS informant (8a). He pointed out that the District Judge found that the deposition was being taken "'in good faith'", in a proper manner and was "'a necessary step in the due and proper preparation for trial'" and that those "findings were entirely justified" (8a).

Statement

Respondent Garland instituted an action against Columbia Broadcasting System, Inc. in the United States District Court for the Southern District of New York on two causes of action, including a cause of action for the libel (6-8) which appeared in the column referred to. Petitioner quoted

statements made by a CBS "network executive" that respondent who is a professional actress, singer and "star of the first magnitude" and "a performer of the highest standing" (6) "doesn't want to work", had an "inferiority complex", "won't make up her mind about anything", is "terribly fat") (9, 10) and otherwise seriously reflecting upon and affecting the reliability of respondent as a professional performer in the theatrical and TV world. The column appeared in the New York Herald Tribune, which has a circulation of 367,248 (27) and was syndicated in newspapers throughout the country (28).

Depositions of a number of executives of Columbia Broadcasting System were taken but all of them denied making statements to Torre and denied knowledge as to who had made them (19), (93, 94). Interrogatories dated November 20, 1957 were then addressed to Columbia Broadcasting System which denied knowledge as to who made the statements to Torre—as appears from the following:

> "Interrogatory Number 1: Did any person or persons in the employ of the defendant Columbia Broadcasting System, Inc. make any statement, either orally or in writing, to one Marie Torre concerning the plaintiff Judy Garland between the first day of January, 1957 and the 11th day of January, 1957?
>
> "Interrogatory Number 2: Did any person or persons in the employ of the defendant Columbia Broadcasting System, Inc. speak to one Marie Torre of or concerning the plaintiff Judy Garland or have any conversation with one Marie Torre in which the name of the plaintiff Judy Garland was mentioned, between the first day of January, 1957 and the 11th day of January, 1957?"

The attorneys for Columbia Broadcasting System, Inc. by notice dated December 3, 1957, answered said two interrogatories as follows:

> "Interrogatory Number 1: Not so far as defendant has been able to ascertain.

"Interrogatory Number 2: Not so far as defendant has been able to ascertain."

The aforementioned interrogatories and answers thereto were certified as part of the record now on file in this Court (see pp. 220-221 and 257-258 of said record).

Thus, indisputably respondent was not able to obtain the name of the Columbia Broadcasting System executive from Columbia Broadcasting System officials. She was not obliged as suggested in the petition (21) to go to the absurd length and expense of taking the deposition of every employee of the entire Columbia Broadcasting System.

The deposition of petitioner was taken and appears in full in the Joint Appendix (24-39). She testified that the quotations in her column were the "exact words" of the "network executive" (31). She was asked for the name of the network executive and she refused to give it (32). *She was then asked "Q. Did this network executive ask you to withhold giving his name?" And she answered "A. No, he did not* * * *" (32). (Italics ours.)

It was thereafter that the proceeding was instituted to punish her for contempt.

The motion to punish petitioner for contempt was met by a cross-motion by her under Rule 30 (42) for an order directing that the name of the network executive should "not be inquired into" on the ground that that "would unreasonably annoy, embarrass and oppress" her (42)—a contention seemingly based on the notion that a newspaper employee is not under the same duty as any other witness to give material testimony. Mr. Justice Stewart stated that the question asked of petitioner "went to the heart of the plaintiff's claim" (7a). The District Judge found (116)—and the Court of Appeals concurred (8a)—that petitioner's deposition was being taken in good faith, in a reasonable manner, was a necessary step in the proper preparation for trial and that "we have no assurance, even

if the examination were delayed, that the position taken by the witness would in any way be changed" (116). He held that the examination was "not unreasonable or oppressive in scope" and denied the cross-motion (116). The disposition of that motion was a discretionary matter with the District Court and the Court of Appeals held there was no abuse of discretion.

POINT I

Petitioner, claiming protection under the First Amendment, in reality asserts a privilege where none exists.

Petitioner refers (p. 15, *et seq.* of her petition) to the English cases on the question of privilege. She has cited no decision by a state or federal court. In each of those English cases, the newspaper was the defendant and the name of the person who informed the newspaper was, in any event, immaterial. In the instant case the New York Herald Tribune is not a defendant and it is basic to respondent's libel action that she ascertain the name of the CBS executive who made the statement in order to show that such person was in a position of authority to bind CBS.

In New York State, a reporter is not privileged and as Mr. Justice Stewart stated, the federal courts have also ruled that a newspaper reporter is not privileged.

In *People ex rel. Mooney v. Sheriff of New York County*, 269 N. Y. 291 (1936). the New York Court of Appeals expressly held that a reporter on the New York American was not privileged from disclosing the source of his information. The Court of Appeals stated the following at page 293:

> "The only question presented on this appeal is whether a newspaper reporter may lawfully refuse to answer pertinent questions relating to communica-

tions made to him as a reporter on the ground that such communications are privileged."

The Court of Appeals then stated the following, quoting from Wigmore on Evidence at page 294:

> "5 Wigmore on Evidence (p. 1) contains a discussion on the subject of privileged communications. Section 2286 reads: '* * * Accordingly, *a confidential communication* to a clerk, to a trustee, to a commercial agency, to a banker, *to a journalist*, or to any other person, not holding one of the specific relations hereafter considered, *is not privileged from disclosure.*'" (Italics ours.)

And further at page 295 the Court of Appeals stated:

> "*The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail.* The granting of a privilege from such disclosure constitutes an exception to that general rule. In the administration of justice, the existence of the privilege from disclosure as it now exists often, in particular cases, works a hardship. *The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege.*" (Italics ours.)

Petitioner has quoted (page 9 of the petition) from a statement by Professor Chafee but Professor Chafee clearly referred to "confidential sources of information" and stated that it is desirable to respect a reporter's claim of "confidence except in cases of great necessity where he clearly possesses knowledge which is otherwise unobtainable." In this case, petitioner admitted that the statements were not made to her in confidence and respondent has not been able to obtain the essential information from any other witness.

On at least nine different occasions, bills introduced in the New York State Legislature for the purpose of giving reporters a privilege against disclosure were not passed. See New York Law Revision Commission, *Report* (1949) Appendix B, pp. 101-125.

As stated in the petition (page 8 thereof), twelve states have enacted laws granting a privilege to newspaper reporters.

The obvious remedy of petitioner lies with the legislature.

The absence of any decision by a state or federal court in support of petitioner's contention and the enactment of laws granting a privilege in some states is clear indication that since the Constitution was adopted, it is fundamental in our law that a newspaper reporter is no different from any other witness. Declaration of a constitutional privilege at this time would overthrow the considered decisions of every court which has passed upon this question and change a principle which is basic to the administration of justice.

POINT II

Petitioner has already disclosed the source of her information by stating in her column that it was a CBS "network executive". All that she is required to do is to give the name of the network executive.

Petitioner identified her source as a "network executive" of the CBS system. In her column she did not content herself with making statements concerning respondent as matters of her own knowledge nor did she state that she had obtained the information from a "reliable source." *She was not content with anonymity,* but obviously wanted to lend prestige and give weight and credence to her quotations by attributing them to a "network executive" in the employ of one of the two largest TV networks in this country. Thus she disclosed the source of her information. Suppose that petitioner had written in her column that her source of information was "one of

the Vice Presidents of the XYZ Bank of New York City" or was "a member of the Federal Communications Commission;" can it be doubted that she has thus stated the source of her information? Additionally, she admitted that "this net work executive" had not asked her "to withhold giving his name" (32).

The position taken by petitioner comes to this—she should be free to repeat libelous statements for widespread publication and yet to be able to protect the real libeller from being identified by name. If her position is sound, then a slanderer may accomplish his purpose by using a newspaper reporter to repeat his statements, without fear of detection or liability.

POINT III.

Compelling petitioner to state the name of the executive is not an impairment of the First Amendment and even if there were some impairment, the public interest in compelling testimony of the witness is paramount.

Petitioner was free to gather news and print news as she saw fit. Compelling her to state the name of the CBS executive *to whom she thus specifically referred*, in no way interferes with her freedom to continue to do so. *Certainly, there was no interference with her publishing what she chose to publish in this instance.* There was no discrimination against a newspaper as in the case involving special taxes imposed on newspapers, relied on by petitioner.

If the petitioner is right in this case in asserting that compelling her to name the CBS executive is a violation of her rights under the First Amendment, *then every witness who is called to the stand may similarly refuse to state what he said off the stand on the ground that compelling him to do so would violate his right of freedom of speech under the First Amendment.* He would assert

that being compelled to testify would be a restraint upon his right to speak what he chooses to speak.

Suppose instead of having printed the statements of the CBS executive Torre had repeated them orally and attributed them to that executive, can it be doubted that she could be compelled on the witness stand to state his name?

Because as Mr. Justice Stewart stated (4a to 5a), freedom of the press "is not an absolute" and "the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom."

Mr. Justice Stewart further stated that "The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guaranty ~~that it is the duty of a witness to testify in a court of law~~ of a free press" (5a) and the "essentiality to the fabric of our society" (5a) of the correlative right to compel a witness to testify "is beyond controversy" (5a). Thus if "the freedom of the press is here involved * * * it, too, must give place under the Constitution to a paramount public interest in the fair administration of justice" (p. 6a).

CONCLUSION

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

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MARIE TORRE,

Petitioner,

v.

JUDY GARLAND,

Respondent.

PETITIONER'S REPLY BRIEF.

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November 24, 1958.

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PETITIONER'S REPLY BRIEF.

Petitioner respectfully submits this reply brief to note certain omissions and correct certain errors contained in respondent's brief in opposition.

I.

Respondent's failure even to attempt to sustain the burden of showing good cause for discovery.

Perhaps the most significant feature of respondent's brief is its careful omission of any reference to Point V of the petition: the fact that disclosure was here ordered in the absence of—and without even requiring—a showing of good cause therefor.

It is submitted that the criteria applied by this Court in *Hickman* v. *Taylor* are equally applicable here and that forced disclosure of confidential news sources should not

be ordered where the litigant has demonstrably failed to bear the "burden [resting] on the one who would invade that privacy to establish adequate reasons to justify production. . . ." *Hickman* v. *Taylor*, 329 U. S. 495, 512 (1947).

II.

Grant or withholding of constitutional freedoms cannot be made to turn on this respondent's evaluation of the significance of the news involved.

Respondent readily satisfies herself that "freedom of the press" is not here involved and that, indeed, petitioner is not a "reporter" because, in respondent's view, the news here involved was not sufficiently weighty. Respondent's Brief, pp. 2-3.

As this Court has recognized on innumerable occasions, the sweeping constitutional freedoms of speech and press would be futile indeed if their ambit was restricted to speech unexceptionable in form and content.*

Respondent also urges that petitioner, like a "linotypist or an engineer", is beyond the reach of First Amendment protection. *Id.*, p. 3. As respondent must surely realize, petitioner has never contended for newspaper employees as such—the obvious test is whether the person involved is, like petitioner, part of the news-gathering process and

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* See, *e.g.*, *Winters* v. *New York*, 333 U. S. 507, 510 (1948):

"We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. * * * What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

whether constraint on a communication to that person would reduce the flow of news to the public.

Perhaps the short answer to respondent's contention is that, overwhelmingly, the press of this nation has expressed its concern with the decision below and has recognized editorially that the action of this Court in this case will establish a precedent hitherto lacking, a precedent whose impact will be immediate and will reach far beyond the facts of this particular case.*

III.

The Court below recognized and the record clearly establishes the confidentiality of the communication to petitioner.

Throughout her brief, respondent repeatedly assures this Court that there is really no question before it of violation of a confidential relationship, since petitioner's source "'. . . concededly, did not make the statements to her in confidence (32)'". Respondent's Brief, p. 3; see also *id.*, pp. 7, 9.

The record reference supposedly supporting the statement is then set out in the following abbreviated form:

> "*She was then asked 'Q. Did this network executive ask you to withhold giving his name?' And she answered 'A. No, he did not . . .'* (32)." *Id.*, p. 7 (italics in original).

The complete quotation in the record, however, reads as follows:

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* See, *e.g.*, Appendix C to Petition, listing some 70 publications which editorially urged that this Court review and reverse the decision below. Since the printing of the petition, an additional 40 editorials to the same effect have appeared or have been brought to petitioner's attention.

"Q. Did this network executive ask you to withhold giving his name? A. No, he did not. *It is just that having worked in the business so long in cases like this you don't mention the man's name.*" Joint Appendix, p. 32 (emphasis supplied).

When respondent's counsel continued to press for disclosure of the news source, petitioner further testified: "*You are asking me to violate a confidence.*" *Id.*, p. 33 (emphasis supplied).

It would seem that respondent cannot seriously dispute that the communication here involved was (in the words of Wigmore) "in the implied confidence of a confidential relation."

IV.

Respondent may well be able to obtain from other sources the information sought.

Respondent cites Professor Chafee's statement that a reporter's claim of confidence should be respected "except in cases of great necessity where he clearly possesses knowledge which is otherwise unobtainable" (Respondent's Brief, p. 9), but, respondent argues, "indisputably respondent was not able to obtain the name of the [CBS] executive from [CBS] officials." *Id.*, p. 7.

Respondent rests this conclusion on certain answers given by CBS to interrogatories served by respondent. *Id.*, pp. 6-7.

Respondent has given, however, somewhat less than the whole story. Respondent has not always viewed these answers as foreclosing further inquiry.

Upon receipt of CBS' answers, respondent moved to compel further answers, stating that the answers served

were "inadequate and insufficient as a matter of law and are, in effect, no answers at all." Affidavit of respondent's counsel, December 9, 1957.*

CBS opposed respondent's motion in an affidavit, December 18, 1957, which disclosed that CBS had circularized its employees and that two named employees had conceded that they might have made the statements here involved to petitioner.

Respondent's motion was then granted, with the provision that "If parties cannot agree upon the extent of the further efforts to be made by the defendant [CBS], the issue may be tested by a similar motion, if necessary, upon the submission of the further answers."

To date, respondent has made no further effort to reach such agreement with CBS, has made no further motion as suggested by the motion judge, and has not even sought to take the deposition of one of the two CBS employees specifically identified by name by CBS.

Respondent seeks to gloss over her failure to explore alternate sources of securing the information she purportedly desires by complaining that she was not obliged "as suggested in the petition (21) to go to the absurd length and expense of taking the deposition of every employee of the entire Columbia Broadcasting System". Respondent's Brief, p. 7.

As the page reference in the petition discloses, petitioner, of course, never took any such position. Petitioner did state that it was incumbent upon respondent to at least complete the depositions of the two persons named as possible sources by CBS prior to seeking to have a reporter imprisoned for preserving a professional confidence.

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* These proceedings occurred after petitioner's original citation for contempt and are on file in the records of the United States District Court for the Southern District of New York, which this Court may, of course, judicially notice. The proceedings were also called to the attention of the Court of Appeals.

V.

Respondent's purported distinction of the English authorities is specious.

Respondent blandly dismisses the English precedents, see Petition, pp. 15-17, on the ground that newspapers there were the defendants and "the name of the person who informed the newspaper was, in any event, immaterial". Respondent's Brief, p. 8.

This statement is wholly at variance with the cases. Indeed the striking feature of these cases is that they preserve the confidence of news sources even where the defendant had pleaded fair comment, thus bringing the identity of the source squarely into issue.

The significant factor is not, of course, whether or not a newspaper was the defendant, but that the libel action was grounded on matter appearing in a newspaper, thereby affording the aggrieved person a remedy in a libel action against the newspaper. The newspaper then was confronted with the alternatives of disclosing the source or accepting the risks of defending without establishing the authenticity and good faith of the news source, with all the adverse inferences that could be drawn therefrom.

That in the present case respondent's evaluation of her libel action was such that she has elected not to institute suit against the newspaper can hardly improve her position.

VI.

Respondent's attempted distinction between disclosure of source and disclosure of name is without substance.

Respondent contends that petitioner's reference to her source as a "network executive" constitutes a "disclosure" of petitioner's source. Respondent's Brief, pp. 2, 10-11.

This argument was urged upon both courts below by respondent at great length and was, properly, totally ignored by both courts.

Petitioner, of course, has not in fact disclosed her source; if she had, respondent would never have brought this proceeding.

Moreover, as a cursory scanning of any newspaper demonstrates, important news is frequently communicated to the public accompanied by a general reference to the news source; indeed, in some instances, such general reference may be the very factor which makes the news story significant. To contend that protection of the source should be withdrawn under such circumstances would deprive such protection of all substance and render it wholly unworkable in practical application.

Conclusion.

Over and beyond the specific errors of respondent's brief, there is one crucial defect which pervades the whole: respondent's attempt to brand the relief here sought as an attempt by the press to arrogate to itself some special privilege.

If it were the press alone that would suffer from the effects of the decision below, then this case might have less claim on this Court's attention.

But there is more at stake here. The number is legion of news articles—articles affecting our national security and the operation of our Government—which were disclosed to the press by confidential news sources, and which never would have been so disclosed had the source believed that disclosure of his identity could thereafter have been compelled. In many instances, the public interest has been greatly served thereby.

If this Court should not grant review, these sources, at the very least, will be less ready to expose themselves to the dangers of retaliation, and news will be lost to the public.

At issue here is not a request for solicitude for a particular profession. It is the freeing of the gathering of news from a real and practical restraint that must here be determined.

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari herein prayed for should be granted.

Respectfully submitted,

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November 24, 1958.